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In the Supreme Court of the United States

No. A-481

~~72-870~~

FRED ARNOLD CLEMONS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Fred Arnold Clemons, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the order entered against him on October 16, 1972, by the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *Fred Arnold Clemons,* (No. 72-1316), affirming the judgment of the United States District Court for the Middle District of Tennessee in *United States* v. *Clemons,* (No. 14,532).

OPINIONS BELOW

The order of the United States District Court for the Middle District of Tennessee overruling petitioner's motion to dismiss the cause for lack of a speedy trial is printed in the Appendix hereto, *infra*, Appendix A (p. A1). The order of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra*, Appendix B (p. A3).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether the petitioner was denied his right to a speedy trial in violation of the Sixth Amendment to the Constitution of the United States when over twenty-three (23) months expired from the time of his arrest until the time of his trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

STATEMENT OF THE CASE

A nine count indictment was filed against petitioner and five (5) other defendants on February 12, 1970, charging in Count One that from on or about January 9, 1970, to on or about January 21, 1971, the petitioner and the five (5) other defendants conspired to keep in their possession and conceal falsely made and counterfeited U. S. Federal Reserve Notes in violation of Title 18, U.S.C., Section 472, and to transfer and deliver those notes in violation of Title 18, U.S.C., Section 473. Petitioner was charged in Count Two with possession of counterfeit notes on January 9, 1970, in Count Three with transferring those notes of January 9, 1970, in Count Four with possession of counterfeit notes on January 10, 1970, in Count Five with delivering those notes on January 10, 1970.

On November 10, 1971, the Trial Judge ordered that the case be set for trial on December 16, 1971, and on December 17, 1971, petitioner was found guilty on Counts One, Four and Five by the Trial Judge, trial by jury having been waived. The Trial Judge then sentenced petitioner to five years imprisonment on each of Counts One, Four and Five, with the sentences on each count to run concurrently with each other.

Prior to the trial of petitioner, he filed a timely motion to dismiss the charges for lack of a speedy trial. The motion was denied by the Trial Judge.

ARGUMENT

The United States Constitution Amendment VI states in part that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. The petitioner was arrested on January 10, 1970, indicted on February 12, 1970, and araigned on March 11, 1970. On November 10, 1971, the Trial Judge set the case for trial on December 16, 1971. Therefore, from March 11, 1970, until November 10, 1971, the Trial Judge made no effort to set the case for trial. The mere setting of the case for trial would have tolled any argument for a dismissal for lack of a speedy trial.

The Government countered the petitioner's motion for dismissal by using the stock phrase, "It is obvious that the only reason for the 'delay' is the congested court calendar and the demands upon the Court's time presented due to the volume of cases in this jurisdiction." However, after petitioner's co-defendant, Arville Knight, filed a motion for a speedy trial on November 9, 1970, *and* after petitioner's co-defendant Howard Wyatt filed a motion for a speedy trial on September 15, 1971, then the Trial Judge on November 10, 1971, found that its Court calendar was not so crowded that he could set the case for trial within six weeks.

The right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. *Klopfer* v. *State of North Carolina,* 386 U.S. 213 (1967). In *Dickey* v. *Florida,* 398 U.S. 30, Chief Justice Burger stated at page 37,

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the

prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. State claims have never been favored by the law and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."

Justice Brennan, concurring in *Dickey, supra,* at page 41 states:

"The evils at which the clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process. As we observed in *Klopfer, supra,* 386 U.S. at 222, lengthy prosecution may subject an accused to 'public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.' "

It is submitted that since the right to a speedy trial is a fundamental right guaranteed to all defendants, the burden should not be on the defendant to show prejudice by delay, but the burden should fall on the Government to show the reason for the delay and the lack of prejudice sustained by the defendant. Unlike the law pertaining to the right to counsel, the defendant now has the burden of insuring for himself the right to a speedy trial by taking an affirmative action demanding that he be brought to trial within a reasonable amount of time. Therefore, it should be presumed that the accused desires a speedy

trial, unless he expressly accepts or requests a delay. Two co-defendants in this case had to demand that the Government try the case!! The Government sustained no delays in the arrest of the defendants and the swift indictments of the defendants, yet it waited almost two years to try the petitioner and his co-defendants. Surely, the Government should pay the price for this delay, and not petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

CRIMINAL No. 14,532

December 16, 1971

UNITED STATES OF AMERICA

vs.

FRED ARNOLD CLEMONS, HAROLD EDWARD HALE, HOWARD WYATT, LLOYD WILLIAM KIRKHAM, ARVILLE BLONDELL KNIGHT

(Filed January 28, 1972)

Came the Assistant United States Attorney and also came the defendant, Fred Arnold Clemons, in person, and by his attorneys, Dale Quillen and Ronald Curtis; the defendant, Harold Edward Hale, in person, and by his attorney, James L. Roberts, who was heretofore appointed by the Court to represent this defendant; the defendant, Howard Wyatt, in person, and by his attorney, Lucien Dale; the defendant, Lloyd William Kirkham, in person, and by his attorney, Dale Quillen; and the defendant, Arville Blondell Knight, in person, and by his attorney, Norris Jenkins, who was heretofore appointed by the Court to represent this defendant; said defendants having heretofore entered pleas of not guilty to the counts charged in the nine count indictment charging violation of Sections 2, 371, 472, and 473, 924(c)(2), Title 18, United States Code, and the case having been set for trial today.

Under the indictment herein the defendant Fred Arnold Clemons is charged under counts one, two, three, four, and five; the defendant Harold Edward Hale is charged under counts one, four, and five; the defendant Howard Wyatt is charged under counts one, four, five, and eight; the defendant Lloyd William Kirkham is charged under counts one, four, and seven; and the defendant Arville Blondell Knight is charged under counts one, four, seven, and nine.

Thereafter, the Court ORDERED that the Motions to Dismiss for Denial of Speedy Trial, heretofore filed by each of the named defendants herein, be and the same are hereby denied.

Thereupon, the defendants herein, and each of them, after being fully advised of their rights to a trial by jury, waived such right in open Court and each executed a waiver of jury trial form.

After hearing part of the evidence in the case, the hour for adjournment having arrived, it is ORDERED that the trial of this case be recessed until 9:00 A.M., Friday, December 17, 1971.

Enter:

/s/ Frank Gray, Jr.
United States District Judge

Approved for Entry:

/s/ (Illegible)
Assistant United States Attorney

APPENDIX B

UNPUBLISHED

Nos. 72-1315-18

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARVILLE B. KNIGHT, LLOYD WILLIAM KIRKHAM, FRED ARNOLD CLEMONS, HOWARD WYATT,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Tennessee

(Filed October 16, 1972)

Before PHILLIPS, Chief Judge, KENT, Circuit Judge, and WELLFORD, District Judge.*

PER CURIAM. In this consolidated appeal, appellants seek reversal of their convictions for conspiracy to possess and possession of counterfeit bills.

Appellants claim their Sixth Amendment right to speedy trial has been abridged. They were indicted on February 12, 1970, and arraigned on March 11, 1970. Their trial was held in District Court on December 16, 1971. Appellant Knight had filed a motion for trial on November 9, 1970, and appellant Wyatt had filed a similar motion on

*Honorable Harry W. Wellford, Judge, United States District Court for the Western District of Tennessee, sitting by designation.

September 15, 1971. Applying the balancing test delineated by the Supreme Court in *Barker* v. *Wingo*, ... U.S. ....., we find no violation of the Sixth Amendment rights of the appellants under the facts in the present case.

Appellants Knight and Kirkham contend that the evidence seized in the search of their motel room should have been suppressed. We find that this evidence was obtained in a search incident to a lawful arrest and therefore admissible.

Additionally, Knight's second arrest was in accordance with T.C.A. §§40-1225-40-1229 and therefore the search of the person of Knight incident to this arrest was valid and the evidence obtained from it was admissible.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-870

FRED ARNOLD CLEMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial with others in the United States District Court for the Middle District of Tennessee, petitioner was convicted on three counts of having possessed and transferred counterfeit Federal Reserve Notes, and of conspiring to commit the substantive offenses, in violation of 18 U.S.C. 472, 473, and 371. He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. B).

Petitioner was arrested on January 10, 1970. He and others were indicted on February 12, 1970, and arraigned on March 11, 1970. Two of petitioner's co-

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defendants thereafter filed motions for a speedy trial on November 9, 1970, and September 15, 1971, respectively. On November 10, 1971, the case was set for trial on December 16, 1971. Trial was held on that date after the court denied motions by all the defendants to dismiss for lack of a speedy trial (Pet. App. A). The government requested no continuances and petitioner at no time moved to have the case set for trial. We are advised—and petitioner does not dispute (see Pet. 4)—that the delay between indictment and trial resulted primarily from congestion of the court calendar, although petitioner's co-defendants did make pretrial motions for suppression of evidence and for discovery which accounted for some of the delay.

Petitioner's sole contention is that the 23-month period between his arrest and the date of trial constituted a denial of his right to a speedy trial, in violation of the Sixth Amendment. The court of appeals, however, correctly applied *Barker* v. *Wingo*, 407 U.S. 514, in rejecting this contention. This Court in *Barker* adopted a four-point balancing test for determining whether a defendant has been deprived of his right to a speedy trial. The test takes into account the conduct of both the prosecution and the defense with respect to the length of the delay, the reason therefor, the defendant's assertion of his right, and the prejudice resulting from the delay (407 U.S. at 530). Applying that test to the facts of this case, we note that the 23-month period complained of is less than half the delay in *Barker*, that the delay was caused by

court congestion and not by prosecution tactics,[1] that petitioner never asserted his right to a speedy trial, and that no prejudice to the preparation of a defense is alleged to have resulted. Petitioner was, moreover, at liberty on bond throughout the pretrial period.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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[1] This Court observed in *Barker* that "different weights should be assigned to different reasons" and that a "more neutral reason such as * * * overcrowded courts should be weighed less heavily" than a "deliberate attempt [by the prosecution] to delay the trial in order to hamper the defense" (407 U.S. at 531).

U.S. GOVERNMENT PRINTING OFFICE: 1973